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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-914

BELLE FEW THOMPSON, *et al.*,

Petitioners,

v.

MAX SHEPPARD, JR., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners,

v.

MAX SHEPPARD, JR., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Belle Few Thompson, et al., respectfully pray that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 8, 1974 and October 25, 1974.

Opinions Below

The opinion of the Court of Appeals is reported at 490 F.2d 830, and is reprinted in the Appendix hereto at pp. 7a-13a. The opinion of the Court of Appeals denying rehearing is reported at 502 F.2d 1389, and is set out in the Appendix hereto at pp. 14a-20a. The opinion of the District Court of January 12, 1973, which is not reported, is set out in the Appendix hereto at pp. 1a-5a. The order of the

District Court of April 17, 1973, which is not reported, is set out in the Appendix hereto, p. 6a.

Jurisdiction

The judgment of the Court of Appeals was entered on March 8, 1974. The judgment of the Court of Appeals, denying petition for rehearing and rehearing en banc, was entered on October 25, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the District Court, having found a pattern of racial discrimination in the selection of grand and petit jurors, provide the "detailed and stringent injunctive relief" required by *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), when it permitted the use of inherently discriminatory criteria which resulted in substantial underrepresentation of blacks on those lists?

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment to the Constitution of the United States.

Section 243, 18 U.S.C., provides in pertinent part

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude . . .

Section 59-106, Code of Georgia annotated, provides

At least biennially, or, if the Judge of the superior court shall direct, at least annually, on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such list the commissioners shall select a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list which was used in the last preceding general election. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross-section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly representative thereon.

After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead. (Book 18, 1972 Cumulative Pocket Part, p. 28)

Statement of the Case

This action was commenced on November 22, 1972, on behalf of black and female citizens who alleged that they had been unconstitutionally excluded from service on grand and petit juries in Dougherty County, Georgia. The defendants are the members of the Jury Commission of Dougherty County and other Dougherty County officials responsible for the selection and composition of grand and petit jury lists.

After a hearing the United States District Court for the Middle District of Georgia concluded that blacks and women had been unconstitutionally excluded from the existing grand and petit jury lists.[1] The District Court issued a preliminary injunction enjoining the use of these lists and directing the defendants to prepare new grand and petit jury lists from which blacks and women were not so excluded.

Following the District Court's order the defendants prepared new grand and petit jury lists. Blacks were still substantially underrepresented on both of these new lists. Plaintiffs objected to approval of these lists on the ground that the defendants had failed to remedy the proven violation. After a hearing the District Court issued a one sentence order approving the new grand and petit jury lists.

On March 8, 1974, the Court of Appeals affirmed the order of the District Court approving the new lists. On October 25, 1974, the Fifth Circuit denied petitioners' petition for rehearing and rehearing en banc. Two members of the Court of Appeals, Judge Goldberg and Chief Judge Brown, dissented from the refusal to grant rehearing en banc.

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[1] See Appendix, pp. 1a-5a.

Statement of the Facts

Preparation of Petit Jury List

The old traverse or petit jury list prepared by the defendants in 1972 was the result of a two step procedure. First, the Jury Commissioners, although not required to do so by state law, expressly excluded from consideration any otherwise eligible adult who was not registered to vote.[2] Second, the Commissioners reviewed the name of the registered voters and picked out those whom they regarded as "upright and intelligent." Voters were regarded as upright and intelligent if they had been selected for the petit jury list in the past or were personally known to and vouched for by one of the jury commissioners.[3] This resulted in a petit jury panel 12.48% of whose members were black, although blacks constituted 30.23% of the county population over 21. Blacks were thus underrepresented by 58.71%.

The District Court correctly concluded that the petit jury list thus prepared was unconstitutional. It held that "it is the right of every citizen, who is within the age and statutory qualifications, to be considered for jury service" and directed the Jury Commissioners "to do whatever is necessary to consider every person for jury service."[4]

Following the District Court's decision, the defendants undertook to prepare a new petit jury list. Although the subjective "upright and intelligent" test was largely abandoned, the Jury Commissioners again refused to consider any citizen who had not registered to vote. The record reveals, and the Jury Commissioners were aware, that

[2] Transcript of hearing of January 4, 1973, pp. 14, 36, 66, 67.

[3] Transcript of hearing of January 4, 1973, pp. 25, 30, 34, 35.

[4] Transcript of hearing of January 4, 1973, p. 97.

68.0% of the white adults in Dougherty County were registered, compared to only 44.3% of the blacks. By considering only registered voters the defendants excluded from jury service 55.7% of all the eligible blacks in the county. As a result, when approximately 7,300 names were drawn at random from the list of registered voters for possible jury service, only 22.1% of those so selected were black.[5] Questionnaires were sent out to this list of voters; approximately 4,600 were returned. Among the questionnaires returned, after elimination of certain persons exempt from jury duty, blacks constituted 19.15%. Although blacks constituted a disproportionately large proportion of the voters who did not return questionnaires, no effort was made by the Jury Commissioners to follow up this first mailing or to locate voters who had moved to a location within the county since the last election.[6]

Preparation of Grand Jury List

The old grand jury list was selected from among the petit jury list with the vaguely defined purpose of picking "a little higher type [sic]." The Commissioners refused to consider any citizen without prior service on a grand or petit jury, a standard which eliminated most blacks.[7] Among those meeting this test, jurors were chosen who were personally known to and recommended by one of the Jury Commissioners.[8] This selection procedure had the effect of further reducing the proportion of blacks. Thus, although

[5] Transcript of hearing of April 17, 1973, p. 30.

[6] Ibid., p. 13. The proportion of blacks changing residence within the county is significantly higher than the proportion of whites. See U.S. Census 1970, Characteristics of Population, Georgia, Tables 119, 125.

[7] Transcript of hearing of January 4, 1973, p. 55.

[8] Ibid., pp. 46-48.

blacks were 12.48% of the old petit jury list, they were only 10.7% of the old grand jury list, a reduction of 14.4%. Blacks were underrepresented on the old grand jury list by 64.60%.

The District Court correctly concluded that the old grand jury list was unconstitutional. The Court expressly condemned the two primary criteria used in picking grand jurors from the petit juror list—prior service and personal acquaintanceship with a Jury Commissioner[9]—and directed the defendants to prepare a new list.

The Jury Commissioners proceeded to prepare a new list using a slightly rephrased subjective standard, whether a potential grand juror "would serve the public in Albany in a good manner." [10] Except where a potential grand juror was personally known to a member of the Jury Commission, the decision was based on the juror's job. A candidate with a "high position" was regarded as desirable, a mere carpenter was not.[11] In view of the disproportionately low number of non-whites holding professional, technical and managerial jobs in Dougherty County,[12] any such employment test would have had an inherently discriminatory effect. These selection procedures had the effect of further reducing the proportion of blacks. Thus, although blacks were 19.15% of the new petit jury list, they were only 16.45% of the new grand jury list, a reduction of 14.10%. Blacks were underrepresented on the new grand jury list by 45.75%.

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[9] Transcript of hearing of January 4, 1973, pp. 96-98.

[10] Transcript of hearing of April 17, 1973, p. 16. Albany is the largest city in Dougherty County.

[11] Ibid., pp. 46-47.

[12] See U.S. Census, 1970, Characteristics of the Population, Georgia, pp. 486, 554.

Reasons for Granting the Writ

In *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), this Court established the right of black citizens, excluded because of their race from service as grand or petit jurors, to maintain a civil action to challenge that discrimination. The question presented by this case is what type of remedy the federal courts must afford once such discrimination has been established. In the instant case, after the District Court found that blacks had been unconstitutionally excluded from the old grand and petit jury lists, the defendants drew up new lists using criteria which they knew had resulted in the past, and would result again, in the exclusion of large numbers of blacks. In the old lists blacks had been underrepresented by 64.60% and 58.71%, respectively, on the grand and petit jury lists; in the new lists blacks were underrepresented by 45.75% and 38.66% respectively. The District Court and Court of Appeals approved the new lists as so constituted. Petitioners maintain that the remedy afforded in this case fell impermissibly short of the "detailed and stringent injunctive relief" required by *Carter*. The failure of the courts below to provide a remedy which *in fact* ends the disproportionate exclusion of blacks is directly analogous to the problem of ineffectual remedies dealt with in *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968). Review by this Court is particularly appropriate because racial discrimination in the selection of juries threatens the very integrity of the judicial process, and because the decision below calls into question the viability of civil litigation as a means of remedying such discrimination.

In *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), this Court made clear the responsibilities of the lower courts in framing a remedy where, as here, jury lists were found to discriminate on the basis of race. Those courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 396 U.S. at 340. Such a decree must both end the discriminatory practices which excluded blacks and result in a jury list on which the number of blacks is no longer disproportionately low. The decree entered in this case and approved by the Fifth Circuit did neither.

In preparing the new petit jury list, the Jury Commissioners made a deliberate decision to consider only registered voters, a practice which they knew had contributed substantially to the invalidity of the old list. The Commissioners were well aware that they were not required to consider only registered voters, but were obligated by Georgia law to use whatever other sources of names were necessary to obtain a jury list which was "a fairly representative cross-section" of the population and so as to increase the number of "citizens of any significant group in the county which may not be fairly represented." Section 59-106, Code of Georgia.[13] The Commissioners knew that blacks were substantially underrepresented on the voter list.[14] The Commissioners also had in their possession lists which could have been used to supplement the voter lists, including a city directory listing the residents of the city of Albany in which 91.7% of the county's black population resided.[15] When asked why the Jury Commission had de-

[13] Transcript of hearing of January 4, 1973, p. 67.

[14] Transcript of hearing of April 17, 1973, p. 30.

[15] Transcript of hearing of January 4, 1973, p. 18; U.S. Census, 1970, Characteristics of the Population, Georgia, p. 12-69.

liberately used only the voter registration list, one Commissioner responded, "I really don't have any reason".[16] In *Carter* this Court stressed that the district court's decree had resulted in substantial efforts to go beyond the available voting list, 396 U.S. at 339-340;[17] no such efforts were required or made here.

Similarly, the only change in the subjective method of picking grand jurors was in altering the description of the vague eligibility requirement from "a high type" person to a person who would serve the public "in a good manner". In practice these standards reduced the proportion of blacks by virtually identical amounts—14.4% in preparing the old list and 14.1% in preparing the new list. The potential for and degree of discrimination in this subjective method is made apparent by comparing the effect of this procedure on blacks with its effect on women. In preparing the old grand jury list the jury commission, ostensibly applying this standard, reduced female representation by 52.1%;[18] in preparing the new grand jury list the jury commission applied a similar test but reduced female repre-

[16] Transcript of hearing of January 4, 1973, p. 67.

[17] This Court expressly referred to *Pullum* v. *Greene*, 396 F.2d 251 (5th Cir. 1968) and *Mitchell* v. *Johnson*, 250 F.Supp. 117 (M.D. Ala. 1966) as examples of the appropriate remedial action. In *Pullum* the court disapproved the creation of a new list based on a voter list with a disproportionately low number of blacks, and required the commissioners to augment the voter list by "the affirmative action of going out and familiarizing themselves with individuals and groups in the community," 396 F.2d at 255. In *Mitchell* the court based its finding of discrimination on the failure of the jury commission to use all reasonable means to identify citizens eligible for jury duty by using "the city directories, the telephone directories and by visiting the precincts in the county," and required the commission to use such sources of names in the future. 250 F.Supp. at 122.

[18] From 24% on the petit jury to 12.48% on the grand jury.

sentation by only 5.8%.[19] The record thus reveals, not a change in the subjective selection methods which had earlier resulted in the unconstitutional exclusion of both blacks and women, but the retention of those methods by a jury commission willing to abandon discrimination on the basis of sex but not on the basis of race.

In addition, the District Court's decree clearly failed to substantially eliminate the pattern of disproportionately low numbers of blacks on the jury lists. In the instant case black underrepresentation on the petit jury was reduced from 58.71% to 36.66%, a reduction of 37.7%. Black underrepresentation on the grand jury declined from 64.65% to 45.75%, a reduction of only 29.2%. The jury lists approved by the District Court and the Court of Appeals in this case clearly failed to end the unconstitutional exclusion of blacks, in violation of this Court's direction in *Carter*, or to produce a "representative cross-section" of the county population, as required by Georgia law.

The Court of Appeals, in failing to provide the remedy required by *Carter*, relied on three standards each of which was squarely in conflict with the decisions of this Court.

First, the Fifth Circuit assumed that, in deciding whether to approve the new jury lists, the question before it was whether those lists were—in isolation—"constitutionally defective." P. 12a. But once the old jury lists had been shown to have been tainted by racial discrimination, the responsibility of the courts below was "to fashion detailed and stringent injunctive relief that will remedy that previous discrimination." *Carter* v. *Jury Commission*, 396 U.S. 320, 336 (1970). Regardless of whether the new jury selection procedures were apparently neutral on their face,

[19] From 37.90% to 35.66%.

as the Fifth Circuit contended, the proper test under *Carter* was whether those procedures were adequate to remedy the prior discrimination. That is not the test applied by the Court of Appeals, nor a test which those procedures could meet. A plan for selecting juries, like a plan for assigning public school students, although not inherently unconstitutional, is not acceptable as a remedy for a previous violation unless it in fact provides "effective relief." *Green* v. *School Board of New Kent County*, 391 U.S. 430, 439 (1968).

Second, the Fifth Circuit held that, in assessing the sufficiency of the new lists, the burden of proof was on the plaintiffs to show that the lists were invalid. P. 12a. This Court, however, has uniformly held that, where a plaintiff establishes that state officials have engaged in discrimination, the burden is on those officials to demonstrate that the remedy they propose will in fact end that discrimination and any continuing effects thereof. *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968). Even if the question in this case were not one of fashioning a remedy but of assessing the validity of a list without a tainted history, plaintiff need only show the exclusion of a disproportionate number of blacks by a method with potential for discrimination. *Alexander* v. *Louisiana*, 405 U.S. 625, 631 (1972). The evidence in the instant case showed precisely those two elements—that blacks were underrepresented by 45.75% and 38.66% on the new grand and petit juries, respectively, and that this resulted from the deliberate and unjustified decision of the defendants to choose jurors from a voter list with a disproportionately low number of blacks, and to select grand jurors using vaguely defined subjective criteria. Even by the standard established by the Fifth Circuit, all that plaintiffs were required to show was that the jury list "was not fairly representative of the in-

habitants." P. 12a. The undisputed evidence established that in Dougherty County, where 31.99% of the inhabitants of voting age were black, only 22.1% of the registered voters were black. Such a voters list, which underrepresented blacks by 30.92%, was manifestly not "fairly representative."

Third, as Judge Brown suggested in his dissent, pp. 16a-17a, the Fifth Circuit failed to use the method established by this Court for calculating the degree of underrepresentation in a case such as this. The record showed that the total county population over twenty-one was 30.23% black, whereas only 19.15% of the petit jurors and 16.40% of the grand jurors were black. The Fifth Circuit calculated the degree of underrepresentation by simple subtraction, yielding figures of 11.08% and 13.83%. This Court has made clear, however, that the degree of underrepresentation is to be calculated by computing what proportion the difference in composition (11.08% and 13.83%) is of the composition of the population (30.23%). See *Alexander* v. *Louisiana,* 405 U.S. 625, 629 (1972). This method of calculation, as Judge Brown noted, reveals that the percentage of underrepresentation was 36.55% on the petit jury list and 45.75% on the grand jury list.

The decision of the Fifth Circuit seriously threatens the vitality of civil litigation as a method of ending racial discrimination in the selection of juries. The use of such civil litigation was first proposed by Justice Jackson in *Cassell* v. *Texas,* 339 U.S. 282 (1950), on the ground that a civil remedy, unlike the assertion of a jury discrimination claim by a criminal defendant, would not entail the reversal of otherwise valid convictions. 339 U.S. at 303-304.[20] See also

[20] "Qualified Negroes excluded by discrimination have available, in addition, remedies in courts of equity. I suppose there is no

Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 411-424 (1971) (Burger, C.J. dissenting). Such civil litigation, to afford an attractive remedy and to protect the legality of subsequent jury verdicts, must entail standards of relief at least as stringent as those required to validate a jury panel challenged by a criminal defendant.[21] The Fifth Circuit has not so provided, nor has it purported to hold the petit and grand jury panels to be constitutionally constituted. The Court of Appeals merely held that the particular plaintiffs in this particular case had failed to meet their "burden of showing" that the new lists were not defective. P. 12a. Such a resolution of this case is an open invitation to criminal defendants to challenge every grand and petit jury chosen from the new lists, and that is precisely what has occurred in Dougherty County following the decision of the District Court.[22] Unless this Court requires that meaningful relief be provided whenever, as here, a civil litigant shows a pattern of racial discrimination in the selection of grand and petit jurors, aggrieved blacks will not have a significant incentive to pursue such civil litigation in the Fifth Circuit. Such an emasculation by the Fifth Circuit of the civil remedy recognized in *Carter* would be particularly serious because it is in states com-

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doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in federal court an individual or a class action for an injunction or mandamus against the state officers responsible . . . I doubt if any good purpose will be served in the long run by identifying the right of the most worthy Negroes to serve on grand juries with the efforts of the least worthy to defer or escape punishment for crime."

[21] See "Jury Discrimination in the South: A Remedy?", 8 Col. J. of Law and Social Problems 589 (1972).

[22] See e.g. *State* v. *Lane* (Indictment No. 34052); *State* v. *Burns* (Indictment No. 25579); *State* v. *Mallory* (Indictment Nos. 34054 and 34082) and *State* v. *Moulden* (Indictment No. 38377).

prising that circuit that the majority of criminal appeals based on claims of jury discrimination have arisen.[22]

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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[23] See e.g. *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Shepherd* v. *Florida*, 341 U.S. 50 (1951); *Whitus* v. *Georgia*, 385 U.S. 545 (1967); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972); and the cases cited in *Peters* v. *Kiff*, 407 U.S. 493, 497, nn. 6-8 (1972) and *Tollett* v. *Henderson*, 411 U.S. 258, 262, n. 2 (1973).

Order of District Court, January 12, 1973

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

Civil Action No. 1224

BELLE FEW THOMPSON, et al.,

Plaintiffs,

vs.

MAX SHEPPARD, JR., et al.,

Defendants.

OWENS, *District Judge:*

Plaintiff Negro citizens complained[1] that the grand and petit jury lists[2] of Dougherty County, Georgia, are un-

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[1] Plaintiffs in their complaint contend, among other things, that this action should proceed as a class action pursuant to Rule 23, Federal Rules of Civil Procedure, and that the Dougherty County Board of Education is also unconstitutionally composed because of the six members of said board of education: two, by law, are chosen by the grand jury and the current two members were chosen by grand juries which were selected from unconstitutionally composed grand jury lists. These claims were not considered by the court; they are reserved until such time as the entire case is heard and decided.

[2] Georgia law provides for a board of jury commissioners composed of six persons appointed by the judge of the superior court. Georgia Code Annotated 59-101. These jury commissioners by law are directed:

"At least biennially, or, if the judge of the superior court shall direct, at least annually, on the first Monday in August, or

constitutionally composed and moved this court for a preliminary injunction. On January 4, 1973, that motion came on for hearing. This order confirms the court's oral decision announced at the conclusion of that hearing.

The undisputed evidence shows that the present grand and petit jury lists of Dougherty County were prepared by the defendant jury commissioners between August 5, 1972, and December 4, 1972. In preparing those lists, the jury commissioners—one of whom is a Negro female, one of whom is a Negro male, and four of whom are white males—in a series of some sixty-two meetings considered

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within 60 days thereafter, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such list the commissioners shall select *a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list which was used in the last preceding general election.* If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross-section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, incuding intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly representative thereon.

"After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead." Georgia Laws 1968, p. 533; Ga. Code Ann. 59-106. (emphasis added).

every name on the then most recent general election registered voters list containing some 27,000 names. From those names they generally selected persons (a) who were known by one or more individual commissioners, (b) upon personal investigation of a jury commissioner who were recommended by one or more jury commissioners or (c) who were on the most recent preceding jury lists. The grand jury list as thus compiled contains 614 names of which there are 462 white males, 86 white females, 49 Negro males and 17 Negro females—about 87% white and 13% Negro; 83% male and 17% female. The petit jury list contains 3,221 names of which there are 2,194 white males, 625 white females, 257 Negro males and 145 Negro females—about 87% white and 13% Negro; 76% male and 24% female.

According to the 1970 census the total population of Dougherty County was 89,639, of which 48,444 were over twenty-one and among those who could have registered to vote and been considered for jury service. Of the 48,444 persons over twenty-one, there were 22,790 males and 25,423 females; racially there were 33,568 white males and females and 14,465 Negro males and females about 45% male and 55% female; 70% white and 30% Negro.

While as a matter of law the aforesaid numbers and percentages establish a prima facia case of discrimination against females as a group and against Negroes as a group, *Whitus* v. *Georgia*, 385 U.S. 545 (1967), the testimony of both Negro and white jury commissioners established that this discrimination was not intentional or purposeful but instead resulted from the fact that these jury commissioners did not understand that it is the right of every citizen to be considered for jury duty and the responsibility of jury commissioners to fairly consider

every citizen for jury duty. *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966). In exercising their responsibility jury commissioners who obviously already do not personally know and cannot personally become acquainted with all of the some 27,000 registered voters of Dougherty County, are required to demonstrate that they went beyond their personal knowledge and through some system devised by them objectively and fairly considered every registered voter and in so doing "fed each out of the same spoon". These jury commissioners though required to so demonstrate, could not. Accordingly, the present grand and petit jury lists of Dougherty County are unconstitutionally composed. *Turner* v. *Fouche*, 396 U.S. 346 (1970). Being unconstitutionally composed, the present grand and petit jury lists while they may be used for jury selection to the extent that defendant and litigants in the Superior Court of Dougherty County voluntarily waive their constitutional right to a jury selected from a constitutionally composed jury list, may not and shall not otherwise be used by the defendants from and after this date.

In view of the fact that four of the Negro plaintiffs are in jail awaiting grand jury consideration of proposed indictments against them, it is imperative that these defendant jury commissioners proceed without delay to compose new grand and petit jury lists for Dougherty County. They are ordered to do so and no later than ninety (90) days after this date to submit a written detailed report of their actions and a copy of their new grand and petit jury list to this court following which this court will set this matter down for hearing and further consideration.

This constitutes the preliminary injunction of this court. The giving of security is deemed unnecessary by the Court. It is binding "upon the parties to this action, their officers,

agents, servants, employees, and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Rule 65, Federal Rules of Civil Procedure. It shall remain in effect until further order of this court.

So Ordered, this the 12th day of January, 1973.

Wilbur D. Owens, Jr.
United States District Judge

Order of District Court, April 17, 1973

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

Civil Action No. 1224

BELLE FEW THOMPSON, et al.,

vs.

MAX SHEPPARD, et al.

ORDER

It appears to the Court that, within the bounds of what is practical and possible, both the petit and the grand jury lists have been recomposed fairly and legally within the standards known to this Court, and this Court will, therefore, approve and order that as of the revision the grand and petit jury lists of Dougherty County, Georgia are constitutionally composed.

So ordered, this April 17, 1973.

WILBUR D. OWENS, JR.
United States District Judge

Decision of Court of Appeals

Belle Few THOMPSON, et al., etc., Plaintiffs-Appellants,

v.

Max SHEPPARD, Jr., et al., etc., Defendants-Appellees.

No. 73 2519.

United States Court of Appeals,
Fifth Circuit.

March 8, 1974.

Appeal from the United States District Court for the Middle District of Georgia.

Before COLEMAN, AINSWORTH and GEE, Circuit Judges.

COLEMAN, Circuit Judge:

This is an action brought pursuant to 42 U.S.C., § 1983 on behalf of black and female citizens of Dougherty County, Georgia, to enforce their right to serve on grand and petit juries in the courts of that county.

A preliminary injunction at the outset of the proceedings resulted in the compilation of a new jury list, drawn by chance from county voter lists. After a hearing, the District Court approved this list. Plaintiffs are not satisfied and brought this appeal. We affirm the judgment of the District Court.

According to the 1970 Census, Dougherty County then had 48,444 inhabitants over twenty-one years of age.

By percentages, this age group divides statistically into the following characteristics:

White, male and female, over 21 years of age	69.29%

Blacks, male and female, over 21 years of age	30.23%
Black males	12.73%
Black females	17.49%
White males	35.49%
White females	35.19%

There were 29,204 voters, as determined at the previous general election.

After the District Court prohibited the further use of the existing jury list and directed the compilation of a new one which would pass constitutional muster, a new jury list was compiled by a computer process which automatically selected every fourth name on the voter list, a total of 7,308 individuals (3,507 males and 3,801 females). Seventy five per cent of the names so selected were of white persons and 25% were of black persons, a variation of 5% from the actual racial population proportions of the county.

These 7,308 individuals were sent a racially neutral questionnaire. Of this total, 1,240 were returned by the post office, addressee unknown, while 1,489 addressees simply failed to return the questionnaire at all. 1,078 females claimed the exemption allowed them upon request by Georgia law, 195 individuals claimed an occupational exemption, 224 claimed the over age exemption, 228 cited physical disability, 24 were unable to read or write, 102 were students away at college, and 9 were dead. The record fails to reveal the race of these various groups.

[1] This left a master jury pool of 2,721 names, selected solely by objective methods, with no subjective considerations entering the picture. Of these 2,721, 37.9% were women, which would appear to settle their presence in substantial numbers and we devote no further discussion to that aspect of the case.

Racially, the master jury pool turned out to be composed of 2199 whites (80.8%) and 522 blacks (19.2%).

This results in the following comparisons: Total black population over age twenty-one, 30.23%; percentage of blacks on the jury list, 19.2%. Thus the jury list fell 11% short of proportionate population representation. The record is silent as to how much of this disparity was due to exemptions claimed, inability to deliver the questionnaires, and failure to return them. In any event, the names randomly selected by the computer were within 5% of racially proportionate to the population and there is not a hint that any name was thereafter rejected for any subjective reason.

Plaintiffs rely on Broadway v. Culpepper, 5 Cir., 1971, 439 F.2d 1253 as authority for the proposition that the above method of compiling the jury lists failed to produce the required fairly representative cross section of the inhabitants of the county and argue that supplemental methods should have been used to produce a jury list in which the percentage of black jurors would more nearly approach the actual percentage of those over twenty-one years of age residing in the county.

We must first point out that *Broadway* was not a case in which the jury list had been drawn at random by computer from the voter list, although the Court took pains to praise that procedure [Footnote 19, 439 F.2d at 1259]. Moreover, the *Broadway* Court was careful to emphasize that "Obviously nothing is to be gained by poking around in old 1966, 1967, 1969 ashes. What is desired—what Georgia law and the Federal Constitution demand—is a valid jury list". The case was remanded for further proceedings on a fresh, rather than a stale, record. The District Court was told, however, that in formulating a new jury list the jury commissioners should use "effective means to assure the return of the questionnaires properly filled out and signed and a suitable follow up procedure for actual delivery of those returned as undeliverable".

Finally, the Court expressly declined to define what is required to constitute a fairly representative cross section of the community vis-à-vis comparison with demographic percentages.

We turn for guidance to the decisions of the Supreme Court of the United States. We look first to Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970). This was a Georgia case, originating in Taliaferro County, where 60% of the inhabitants were black. The jury list was not drawn at random. The commissioners pared the voters list of 2,152 down to 608. These names were listed in alphabetical order and every other name (304) was carried forward to a new list, 191 white and 113 black. Further refinements resulted in a grand jury of 17 whites and 6 blacks. 171 Negroes had been eliminated from the list as unintelligent or not upright. The Supreme Court held that Negroes composed only 37% of the 304 member list from which the grand jury was drawn, that this contrasted "sharply with the representation that their percentage (60%) of the general Taliaferro County population would have led them to obtain *in a random selection* (emphasis ours)".

The Supreme Court then added, "In the absence of a countervailing explanation by the appellees, we cannot say that the underrepresentation reflected in these figures is so insubstantial as to warrant no corrective action by a federal court charged with the responsibility of enforcing constitutional guarantees".

It must be remembered that the Supreme Court, 396 U.S. at 360, singled out the use of subjective judgment rather than objective criteria as one of the causes of the impermissible disparity.

In short, there was subjective selection of jurors, there was no drawing at random from the whole body of voters, and 60% of the population wound up with only 25% of the grand jurors.

Obviously, the case now before us is not such a case as Turner v. Fouche.

Carter v. Jury Commission of Greene County, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549, was decided the same day as Turner v. Fouche. In *Greene* the jurors were not selected at random from the whole body of eligibles. Although 65% of the population was black, only 32% of those on the jury roll were black. The discriminatory character of the jury lists was conceded but the Court declined to order the appointment of Negro commissioners, saying, "The appellants are no more entitled to proportional representation by race on the jury commission than on any particular grand or petit jury".

Mr. Justice Douglas dissented in part because he thought the selection of black jury commissioners should be compelled, but wrote:

> "We have often said that no jury need represent proportionally a cross-section of the community. See Swain v. Alabama, 380 U.S. 202, 208 209, [85 S.Ct. 824, 829 830, 13 L.Ed.2d 759]; Cassell v. Texas, 339 U.S. 282, 286 287 [70 S.Ct. 629, 631 632, 94 L.Ed. 839]. Jury selection is largely by chance; and no matter what the race of the defendant, he bears the risk that no racial component, presumably favorable to him, will appear on the jury that tries him. The law only requires that the panel no. be purposely unrepresentative. See Whitus v. Georgia, 285 U.S. 545, 550 [87 S.Ct. 643, 646, 17 L.Ed.2d 599]. Those finally chosen may have no minority representation as a result of the operation of chance, challenges for cause, and peremptory challenges."

This remands us to Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), which declared, "Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group * * * We cannot say that purposeful discrimination based on race alone is satisfactorily proved by

showing that an identifiable group in a community is underrepresented by as much as 10%".

This followed a declaration that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn", 380 U.S. at 208.

[2] We conclude that a jury list drawn objectively, mechanically, and at random from the entire voting list of a county is entitled to the presumption that it is drawn from a source which is a fairly representative cross-section of the inhabitants of that jurisdiction. The presumption, of course, is rebuttable but the challenger must carry the burden of showing that the product of such a procedure is, in fact, constitutionally defective. In addition to the authorities already discussed, see Camp v. United States, 5 Cir., 1969, 413 F.2d 419; Wright v. Smith, 5 Cir., 1973, 474 F.2d 349.

[3] More specifically, in the case now under review we hold that the plaintiffs failed to carry the burden of showing that the Dougherty County jury list was not drawn from a source which was fairly representative of the inhabitants and that they accordingly failed to establish constitutional deficiency on account of racial discrimination in the selection of the jury. As was pointed out in Broadway v. Culpepper, *supra*, the time is at hand for the selection of a new jury list. As in *Broadway*, we remind the defendant-appellees that they should prosecute a more effective follow-up on those whose questionnaires are not delivered and on those who fail to return their questionnaires. A County which has embarked upon a wholly objective method of compiling its jury list, substantially utilizing the same procedure used for the compilation of jury lists in the federal court system, will no doubt comply with these details. If they do not, plaintiffs-appellants, in the exercise of their usual diligence, have the right effectively to question it.

The jury commission, composed of whites, blacks, and women, selected the grand jury list according to the method which the Supreme Court declined to condemn in Turner v. Fouche, *supra*, and we see no reason to hold it fatally defective.

The judgment of the District Court is

Affirmed.

Decision of Court of Appeals Denying Rehearing

Belle Few THOMPSON et al., etc., Plaintiffs-Appellants,

v.

Max SHEPPARD, Jr., et al., etc., Defendants-Appellees.

No. 73–2519.

United States Court of Appeals,
Fifth Circuit.

Oct. 25, 1974.

Appeal from the United States District Court for the Middle District of Georgia; Wilbur D. Owens, Jr., Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 8, 1974, 5 Cir., 1974, 490 F.2d 830).

Before COLEMAN, AINSWORTH and GEE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied.

JOHN R. BROWN, Chief Judge, with whom GOLDBERG, Circuit Judge, joins, dissenting:

I dissent to the Court's failure to rehear this case en banc and on such rehearing reverse and remand the cause to the District Court with appropriate instructions.

THOMPSON v. SHEPPARD

I.

It is, first, enbancworthy, FRAP 35, 28 U.S.C.A. § 46(c), as a case of major importance presenting recurring questions on which this Court in the past 20 years has spoken with a clear voice.

II.

But it is equally enbancworthy as such a case of importance because the result is, in my view, wrong and contrary to what we have consistently held.

The basic error in the beguiling opinion of the Court, Thompson v. Sheppard, 5 Cir., 1974, 490 F.2d 830, is that it confuses two things: (i) proof of discrimination by race (or sex) and (ii) the appropriate remedy once discrimination is found to exist, either in fact, in law, or both.

Although there is loose language in the Court's opinion about failure of plaintiffs to carry their burden of proof there is really no problem of burden of proof in this case. On the initial hearing the trial court assumed that the burden was on the state jury selection officials. And the defended officials, without questioning that in the least, undertook to shoulder that burden. Indeed, except for a few superficial witnesses produced by plaintiffs on aspects which the trial court thought were insignificant, all of the witnesses were put on the stand by the officials. Assaying the 1972 petit and grand jury lists the revelations of that hearing were so shocking that the Judge from the bench held the list to be unconstitutional by reason of discrimination against blacks, as a race, and women, both white and black.

This was the picture:

Table A

Percentage of Blacks in the Over-21 Community	Percent on Master Jury List	Percent on Grand Jury List
30.23%	12.48%	10.7%

Percentage of Women in the Over-21 Community	Percent on Master Jury List	Percent on Grand Jury List
52.68%	24%	12.48%

The District Court ordered the officials to compile a new list which would contain more blacks and women. On the hearing to show cause why the revised list should not be approved the officials again produced all of the testimony. This showed improvement—even substantial improvement—but again there was revealed a staggering, uncontradicted, difference between the percentage of these classes in the adult population of the county and the percentage of such classes on the petit and grand jury lists. This glaring disparity was reflected not only on the difference in percentage points but, more significantly, the percentage of underrepresentation.[1]

1. This was obviously regarded as the significant thing in the analysis made by the Court in this excerpt from Alexander v. Louisiana, 1972, 405 U.S. 625, 629, 92 S.Ct. 1221, 1225, 31 L.Ed.2d 536, 541:

> In Lafayette Parish, 21% of the population was Negro and 21 or over, therefore presumptively eligible for grand jury service. Use of questionnaires by the jury commissioners created a pool of possible grand jurors which was 14% Negro, a reduction by one-third of possible black grand jurors. The commissioners then twice culled this group to create a list of 400 prospective jurors, 7% of whom were Negro—a further reduction by one-half.

Thus, in *Alexander*, the Court did not subtract 7% from 14% for a disparity of only 7%, but calculated that the reduction was one-half, *i. e.*, 50%.

Table B

	(1)	(2)	(3)	(4) Percentage Point Difference, Column (1) Less Column (3)	(5)
	Percentage of Over-21 Community	Original Master List	Revised Master List		Percentage of Under-Representation
Blacks	30.23%	12.48%	19.15%	11.08%	36.66%
Women	52.68%	24%	37.90%	14.78%	28.06%

		Original Grand Jury List	Revised Grand Jury List		
Blacks	30.23%	10.7%	16.40%	13.83%	45.75%
Women	52.68%	12.48%	35.66%	17.02%	32.31%

Upon the completion of the initial hearing the trial court clearly recognized that it had "not merely the power but the duty to render a decree which will *so far as possible* eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Carter v. Jury Commission of Greene County, 1970, 396 U.S. 320, 340, 90 S.Ct. 518, 529, 24 L.Ed.2d 549, 563 (emphasis added), quoting Louisiana v. United States, 1965, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709. Acting under that duty the Judge ordered the preparation of a new and better list. But in the face of continued flagrant underrepresentation shown by Table B that same duty remained.

No explanations really were offered as to why that result was the best attainable "as far as possible", *Carter, supra.* And what evidence was offered, affirmatively proved a number of sources making the system vulnerable.

Intending no disparagement of the use of data computers in the law[2] the Court nevertheless seems in my view to be

2. Ross v. Odom, 5 Cir., 1968, 401 F.2d 464; First National Bank of Birmingham v. Daniel, 5 Cir., 1956, 239 F.2d 801; Bush v. Martin,

almost mesmerized because a data computer was used. But the role of the computer here was very limited and wholly mechanical. It did only two things. First it merely created a "universe" of 7,308 names from the most recent voter list[3] of 29,204 voters, the racial-sex-composition of which was never established. And second it identified the race-sex categories in the "universe". From that point on the computer did nothing.

But the universe of 7,308 dwindled to 2,721 in the course of the further processing by the human beings comprising the officials. This was partly because of certain exemptions, required or claimed, in the answering questionnaire. But larger in numbers, in percentages, and legal significance under this Court's holding in Broadway v. Culpepper, 5 Cir., 1971, 439 F.2d 1253 were the following:

Addressees Not Returning Questionnaires	1,489
Returned By Post Office, Address Unknown	1,240
	2,729

Thus the so-called computer created "random" list of 7,308 was nothing of the kind. At most the universe was reduced to 4,579. But even this was an illusion.

Although I think the Court's declaration that "a jury list drawn objectively, mechanically, and at random from the entire voting list of a county is entitled to the presumption that it is drawn from a source which is a fairly representative cross-section of the inhabitants of that jurisdiction", 490 F.2d

S.D.Tex., 1966, 251 F.Supp. 484; Brown, Electronic Brains and the Legal Mind: Computing The Data Computer's Collision With Law, 71 Yale L.J. 239 (1961).

3. Under current Georgia law, this is the "official registered voters' list . . . as most recently revised by the county board of registrars or other county election officials. . . ." Ga.Code Ann. § 59-106 (1973).

at 833 is an acceptable working principle[4] its conclusion that the plaintiffs "failed to carry the burden * * *" of "showing that the product of such a procedure is, in fact, constitutionally defective", *id.*, is not sustainable on this record. In the first place, there was nothing to prove—nothing, that is, beyond that shown by the testimony from the officials. And the result of the "second try" was still glaring, spectacular, underrepresentation of 36% and 45% as to blacks. (See Table B.) This was proof that for some reason the so-called random selection from the voter list was not adequate to create a fair cross-section of the community.[5] What those reasons might be, and more importantly, what steps should be taken to achieve a fair cross-section and eliminate the causes of the disparity were factual things which *Carter* and *Broadway, supra,* imposed on the officials to prove.

But having responded to the duty following the initial hearing the District Court at this point did nothing. It did not, for example, require or even consider whether sources other than voting lists ought to be used and if so what ones would be the most reliable. Nor did it require that undelivered or unanswered questionnaires be followed up.[6] Nor did

4. Under the federal Jury Selection and Service Act of 1968, 28 U.S.C.A. §§ 1861–1869, and under all plans approved by the Fifth Circuit reviewing panel, *see,* Gewin, The Jury Selection and Service Act of 1968, 20 Mercer L.Rev. 349 (1969), voter registration lists are the principal source. But of course the act itself requires the use of "some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title." 28 U.S.C.A. § 1863(b)(2)

5. In Rabinowitz v. United States, 5 Cir., 1966 (en banc), 366 F.2d 34, 57 we declared:

> The Constitution and laws of the United States place an affirmative duty on the [jury selection officials] to develop and use a system that will probably result in a fair cross-section of the community being placed on the jury rolls.

6. In *Broadway, supra,* 439 F.2d at 1257-1258, we condemn the use of a voter list as a source where 40% of the questionnaires to the voters were undelivered. In doing so we said:

> A list—this constitutes the "universe"—which is only 60% useable is hardly a source reflecting the community from which a fair cross-section may be obtained unless there is proof—lacking

it require an explanation as to why more blacks than whites were excluded when grand jurors were selected under the subjective standards of "intelligence" and "uprightness".

Finally, the Court's decision is in conflict with other decisions with regard to the degree of underrepresentation held to require further remedial action. Thus, in Turner v. Fouche, 1970, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567, the Supreme Court held that further relief was required upon a showing that only 37% of the master list was black in a county 60% black, an underrepresentation of 40%, and in Preston v. Mandeville, 5 Cir., 1970, 428 F.2d 1392, the master list was 16% black in a county 29.3% black, an underrepresentation of 45.4%.

I therefore respectfully dissent.

here—that the composition of the 40% remnant is comparable to the 60% available.

Here of course the remnant was 37% (2,721 of 7,308) and contrasted with *Broadway* was of ¼ of the voters, not all voters.